87-1563

IN THE

Supreme Court of the United States

October Term, 1987

JOHN A. MATT, SR.,

Petitioner,

against

JAMES L. LAROCCA, as Commissioner of the New York State Department of Transportation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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Dated: March 18, 1988

Question Presented.

Whether the Fifth Amendment protects a public employee, under criminal investigation, from discharge, for his failure to answer incriminating questions posed by his employer when such employee has been given no notice and has no knowledge that immunity will attach to his testimony.

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TABLE OF AUTHORITIES.

Opinions Below.

The opinion of the Court of Appeals of the State of New York, which reversed the order of the Appellate Division, Third Judicial Department, was rendered on December 21, 1987. The opinion is reported at 71 N.Y.2d 154 (1987) and is set forth as Appendix "A."

The opinion of the Appellate Division was rendered on May 15, 1986. The opinion is reported at 117 A.D.2d 151 (3d Dept. 1986) and is set forth as Appendix "B."

Jurisdiction.

The order of the Court of Appeals was entered on December 21, 1987. The Court's jurisdiction to review the case rests upon 28 USC §1257(3).

Statement of the Case.

Petitioner, a thirty-four year employee of New York State Department of Transportation (hereinafter "D.O.T."), served faithfully and competently in his position as Canal Section Superintendent until November 23, 1984, when respondent, Commissioner of D.O.T. discharged him for insubordination based upon petitioner's refusal to answer incriminating questions posed by respondent. At the time of petitioner's refusal to answer the incriminating questions, petitioner was without knowledge that his responses could not be used against him in a pending criminal proceeding as the respondent had failed to so advise the petitioner. As a result of respondent's action, petitioner claims that his right against self-incrimination guaranteed under the Fifth Amendment to the United States Constitution was violated by the respondent's discharge of him from his employment based solely

upon petitioner's invocation of his constitutional right against self-incrimination.

The relevant facts that form the basis for petitioner's invocation of his privilege against self-incrimination and respondent's discharge of petitioner for insubordination based upon his assertion of the privilege are as follows: On or about February 2, 1984, petitioner was extensively interviewed by an investigator and an attorney from D.O.T. regarding alleged mismanagement and misconduct in the D.O.T.'s Waterways Division. Specifically, the inquiry focused on the use of State time and State property for personal purposes by employees under petitioner's supervision. Petitioner, as a supervisor, was one of the subjects of the investigation. During this initial investigatory interview, petitioner was not represented by counsel. Petitioner responded openly, honestly and freely to all inquiries.

Based upon information obtained from petitioner in his interview and other sources, respondent referred the information gathered concerning petitioner's conduct to the Oneida County, New York, District Attorney's Office. As a result, from approximately February 28, 1984 until October 17, 1984, petitioner was a target of a criminal investigation conducted by the Oneida County District Attorney.

On February 28, 1984, petitioner was served with disciplinary charges and specifications pursuant to N.Y. Civil Service Law Section 75.[1] The charges alleged, *inter alia*, that petitioner's supervisory conduct constituted penal vi-

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[1]For the Court's convenience, a copy of N.Y. Civil Service Law Section 75 and other relevant New York statutes are attached hereto as Appendix "C."

olations (e.g., Official Misconduct and Criminal Facilitation) in that petitioner failed to investigate and discipline subordinates who had violated State regulations regarding the use of leave credits and other State resources.

Petitioner requested and was denied a hearing on the charges of official misconduct and criminal facilitation brought by the D.O.T. In lieu of a hearing, D.O.T. advised petitioner's attorneys that as part of a separate, ongoing investigation, pursuant to Section 61 of the N.Y. Public Officers Law,[2] petitioner would be asked to testify under oath prior to commencement of a disciplinary hearing for further investigatory purposes. Upon advice of counsel, petitioner rejected that request.

On or about April 16, 1984, while the criminal investigation was ongoing and while subject to disciplinary charges, petitioner was issued a subpoena by respondent pursuant to Public Officers Law, Section 61, directing petitioner to appear and testify under oath and to bring with him a diary he allegedly kept while working for respondent. Upon advice of counsel, petitioner did not appear.

Respondent moved, pursuant to New York Civil Practice Law and Rules, Section 2308(b), to compel petitioner's compliance with the subpoena. By decision dated July 10, 1984, New York Supreme Court, County of Albany (Williams, J.) held that respondent was authorized by Public Officers Law, Section 61, to issue the subpoena as part of a general investigatory power and ordered petitioner to comply with the subpoena. The Court did not pass upon petitioner's constitutional right to invoke the Fifth Amendment in response to specific questions asked

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[2]For the Court's convenience, a copy of this statute is attached as part of Appendix "C."

him at the interrogation, although petitioner raised this as his defense to compliance with the subpoena.

In compliance with the subpoena, petitioner appeared before representatives of the D.O.T. on August 14, 1984. As of that date, the record establishes that petitioner was the subject of three distinct and ongoing proceedings to wit:

(1) a criminal investigation by the Oneida County District Attorney's Office;

(2) a departmental investigation initiated by respondent pursuant to Section 61 of the Public Officers Law;

(3) a disciplinary proceeding initiated by respondent pursuant to Section 75 of the Civil Service Law alleging several breaches of his supervisory responsibilities as well as violation of various sections of the Penal Law.

Due to the pending criminal investigation and the nature of questions presented, on August 14, 1984, petitioner was compelled to invoke his constitutional right against self-incrimination in response to certain questions posed by respondent's representatives. Petitioner freely and fully responded to questions which did not require an incriminating response. In response to particular questions to which petitioner asserted his right against self-incrimination, an attorney for the D.O.T. (Mr. Joseph C. Davidson, Jr.) responded at various times as follows:

> Mr. Davidson: "Well, Mr. Matt, I think I should warn you that your refusal to answer these

questions will be considered further acts of insubordination" (R. 155).

Mr. Davidson: "Mr. Matt, I think I am going to ask you to answer that question and consider that the question is a direct order for an answer" (R. 157).

Mr. Davidson: "I would renew my wording that it is the Department's position that your failure to answer that question in the face of the direct order constitutes insubordination" (R. 158).

At no time during the interrogation did respondent notify petitioner that his answers were protected by, nor did petitioner have knowledge of, a grant of immunity for his incriminating testimony. Petitioner's assertion of his constitutional right was met only with orders to answer and threats that refusal to answer would be considered insubordination which subjected petitioner to discharge.

Based upon petitioner's invocation of his constitutional right against self-incrimination, respondent preferred additional charges against him dated October 2, 1984. These charges alleged, in substance, that petitioner's action of invoking his right against self-incrimination amounted to acts of "insubordination" subjecting petitioner to disciplinary action.

Counsel for petitioner requested that a hearing be held on all charges then pending against petitioner. Respondent denied this request and advised petitioner that a hearing would be held only on the charge of insubordination for failure to answer incriminating questions. Petitioner was never given a hearing on the merits of the underlying charges of official misconduct and criminal facilitation.

Respondent conducted a hearing on October 17, 1984 on the insubordination charge. Subsequently, the hearing officer found petitioner guilty on the charges of insubordination and recommended to respondent that petitioner be suspended for sixty (60) days. Rather than suspending petitioner, respondent rejected the recommendation of the hearing officer and determined to discharge petitioner as punishment for his failure to answer questions posed to him, finding that petitioner "must bear the responsibility for his action in thwarting the Department's orderly process of investigation and administration of the State's business" (R. 19). By letter dated November 23, 1984, respondent advised petitioner that he was discharged from State service effective immediately.

Petitioner thereupon commenced an action pursuant to Article 78 of the New York State Civil Practice Law and Rules, challenging the proceeding on the ground that since respondent failed to advise petitioner that immunity would attach to petitioner's responses by operation of law, petitioner's dismissal was in derogation of the constitutional protection against compelled self-incrimination guaranteed under the federal and state constitutions, and that the proceedings against petitioner were void. Petitioner further asserted that the determination to discharge him for willful misconduct was not supported in the record by substantial evidence and that the dismissal from employment after 34 years of faithful and competent service was so disproportionate to the offense as to shock one's sense of fairness.

The Appellate Division, granting the petition, found that petitioner was entitled to notice of the automatic receipt of immunity. The majority of the Appellate Division granted the petition, holding that "an employee should be accurately and adequately apprised of the immunity con-

ferred in return for answering potentially incriminating or work-related questions as a matter of fundamental fairness." *Matt v. LaRocca*, 117 A.D.2d 151, 153 (3d Dep't. 1986). The Court stated in relevant part:

> Where immunity is conferred by the State, the State cannot penalize the assertion of the constitutional privilege against self-incrimination. We conclude that an individual can stand on his right against self-incrimination until it is made clear to him that he will receive immunity. The record discloses that Petitioner was aware of the criminal investigation being conducted into the matters which were the subject of the examination conducted in August 1984. He was thus entitled to rely on his Fifth Amendment prerogatives until such time as he was informed of the grant of immunity (Citation omitted). Petitioner's early cooperation in the matter is to be noted. We find his subsequent refusal to answer questions under oath as not contumacious but rather an understandable attempt to defend himself by the exercise of constitutionally protected rights.

The New York Court of Appeals reversed the decision of the Appellate Division, concluding that petitioner was not requested to waive his right to immunity before answering questions specifically, directly and narrowly relating to his official duties, and that his dismissal did not violate his privilege against self-incrimination. In so holding, the Court of Appeals refused to follow, under the circumstances presented, its decision in *People v. Masiello*, 28 N.Y.2d 287 (1971), which was predicated upon precedents of this Court.

In holding that the employee's Fifth Amendment rights were not violated by his discharge from employment for his failure to answer incriminating questions, the Court of Appeals acknowledged that the privilege against self-incrimination would be violated if a public servant was required to answer questions upon threat of dismissal and then thereafter to make use of the incriminating statements in a subsequent criminal prosecution. Additionally, citing decisions of this Court, the Court of Appeals stated that the Fifth Amendment would also be violated by a public employer demanding that the employee waive his right to immunity in exchange for continued employment, and may not dismiss that employer for his refusal to do so. The Court of Appeals refused to recognize, however, that the public employer had any duty or responsibility to advise the employee that his answers would not be used against him in the criminal investigation pending against him. Although the petitioner was unaware of immunity and invoked the privilege against self-incrimination in a good faith manner to protect himself, the Court of Appeals held that his discharge was not in violation of his privilege against self-incrimination.

Reasons for Granting the Writ.

The decision of the Court of Appeals addressing an important constitutional issue is in direct conflict with the decisions of this Court that hold that a public employee must not be faced with the choice of either incriminating oneself or face loss of employment.

In this proceeding, the Court of Appeals of the State of New York ruled that the petitioner's right against self-incrimination was not violated by respondent's discharge of him from public employment as the State was not obligated to inform the petitioner that immunity attached be-

fore ordering petitioner to answer incriminating questions. This result is in direct conflict with cases decided by this Court which have upheld an employee's right to assert the Fifth Amendment privilege against self-incrimination when faced with the coercive choice of either incriminating oneself or facing loss of employment. *See Lefkowitz v. Turley,* 414 U.S. 70 (1973); *Uniformed Sanitation Men's Association v. Commissioner of Sanitation,* 392 U.S. 280 (1968); *Gardner v. Broderick;* 392 U.S. 273 (1968); *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Stevens v. Marks,* 383 U.S. 234 (1966); *Raley v. Ohio,* 360 U.S. 423 (1959).

The pertinent issue presented herein is whether the Court of Appeals' ruling abrogates the constitutional guarantee against self-incrimination. Because the issue whether a State employer must affirmatively demonstrate and advise a witness, who is under criminal investigation, that his testimony will not be used against him in a subsequent criminal proceeding is of vital importance to public employees of all fifty states, certiorari should be granted to correct the Court of Appeals' erroneous ruling and to avoid conflict with decisions of this Court.

It is well-settled by decisions of this Court that a public employee may not be discharged for refusing to waive his Fifth Amendment right against self-incrimination. *Gardner v. Broderick,* 392 U.S. 273 (1968). The choice of either incriminating oneself or facing loss of employment is an inherently coercive choice which is prohibited. *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977). The Fifth Amendment protects the employee from choosing between "the rock and the whirlpool." *Stevens v. Marks, supra,* 383 U.S. at 243, *citing Frost Trucking Co. v. Railroad Commissioner,* 271 U.S. 583, 593 (1926). Where an employee faces such a coercive choice and chooses to tes-

tify, the testimony given may not be used against the employee in a subsequent criminal prosecution. *Garrity v. New Jersey,* 385 U.S. 493 (1967). It is equally well-settled that where an employee chooses not to testify, he may not be thereafter discharged for refusing to incriminate himself. *Gardner v. Broderick, supra,* 392 U.S. 273. No sanction or penalty which would make assertion of the Fifth Amendment privilege "costly" may be imposed. *Spevack v. Klein,* 385 U.S. 511, 515 (1967). However, a public employee may be discharged for refusing to answer questions narrowly and specifically directed to the performance of official duties if he or she has not been required to surrender the benefits of their constitutional right to remain silent. *Uniform Sanitation Men's Association, Inc. v. Commissioner of Sanitation,* 392 U.S. 280 (1968).

At issue here is whether petitioner was compelled by respondent to surrender his privilege against self-incrimination. This Court has made it clear that a witness is considered to be under compulsion to surrender the privilege until it is made clear that the immunity will attach to the testimony given. *Stevens v. Marks, supra,* 383 U.S. at 246; *Raley v. Ohio, supra,* 360 U.S. 423. The common denominator in the above-cited cases is that fundamental fairness dictates that the witness be explicitly and clearly advised of the existence and extent of immunity. This is so regardless of whether the immunity is a creature of statute, or arises out of the Fifth Amendment privilege in the context of an administrative disciplinary proceeding. As stated in *Stevens v. Marks*:

> "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him."

Stevens v. Marks, supra, 383 U.S. at 233.

In the instant case, petitioner was never advised, either directly or inferentially, that his answers would not be used against him in a subsequent criminal proceeding. This information was particularly important due to the fact that there was an ongoing criminal investigation into the activities of petitioner and other employees in the Department of Transportation. While propounding questions which required incriminating responses and threatening petitioner with disciplinary action for his refusal to answer certain questions, respondent never mentioned or even alluded to the fact that if petitioner did answer, those answers would not be used against him. Under such circumstances, petitioner was entitled to stand upon his Fifth Amendment right, and he cannot be discharged for doing so, as he reasonably believed that if he answered the incriminating questions, his testimony would be used against him. Petitioner was placed between the "rock and the whirlpool"; either answer the questions and face criminal prosecution or not answer the questions and be discharged. *See Confederation of Police v. Conlisk,* 489 F.2d 891, 894-895 (7th Cir. 1973), *cert. denied sub nom. Rochford v. Confederation of Police,* 416 U.S. 956 (1974); *Kalkines v. United States,* 473 F.2d 1391 (Ct. Cl. 1983). The burden placed on respondent to impart to the petitioner the fact that the testimony given would not be used against him is minimal while the risk and consequences to the petitioner were great. Petitioner should not be made to *speculate* as to whether incriminating statements would be later excluded under *Garrity* as he was at the time under criminal investigation and his livelihood was threatened. *Benjamin v. City of Montgomery,* 785 F.2d 959, 962 (11th Cir. 1986). The fact that petitioner was directed to answer by respondent does not satisfy the constitutional requirement that he be advised that his answers

could be used against him in a criminal proceeding. *Kalkines v. United States, supra,* at 1394.

It is well-settled that the burden is on the state to affirmatively demonstrate to the witness that a valid immunity is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating. *Stevens v. Marks,* 383 U.S. 234 (1966). The injurious effect of the Court of Appeals decision is to shift the burden from the employer to advise the witness of the existence and scope of immunity to the employee who will merely be able to speculate as to whether such immunity will attach. Such a fundamental shift is completely inconsistent with the precedents of this Court which apply an objective standard in determining whether the Fifth Amendment may be properly asserted. As the Court articulated in *Kastigar v. United States, supra,* 406 U.S. at 440, the Fifth Amendment privilege against self-incrimination ". . . protects against any disclosures that the witness *reasonably* believes could be used in a criminal prosecution or could lead to other evidence that might be used" (italics supplied). Petitioner was under investigation for violations of the Penal Law. At the time of the hearing, petitioner was unaware and unadvised that immunity would be granted by operation of law; therefore, it was reasonable for petitioner to believe that his testimony could be used in a criminal prosecution. As far as petitioner knew, he was being forced either to incriminate himself and thereby subject himself to criminal penalties or lose his job.

The Court of Appeals' suggestion that there is no need to inform the witness of immunity because petitioner was not before a Grand Jury investigating criminal charges and since petitioner was assisted and advised by counsel is misplaced. This Court has never held that the constitu-

tional right against self-incrimination attaches only in Grand Jury proceedings or in proceedings where Counsel is not present. In fact, the Court has directly found the contrary to be true. The Fifth Amendment privilege against self-incrimination may be asserted in "*any proceeding*, civil or criminal, administrative or judicial, investigatory or adjudicatory" (italics supplied). *Kastigar, supra,* 406 U.S. at 444. Thus, it is apparent that petitioner has the Constitutional right to assert his right against self-incrimination in the administrative proceeding conducted by respondent. Further, the mere fact that petitioner was represented by an attorney does not diminish this right or alter this analysis. *Kalkines v. United States, supra,* 473 F.2d 1391 at 395.

In its decision, the Court of Appeals misconstrued this Court's application of *Gardner v. Broderick, supra,* 392 U.S. 273; *Uniform Sanitation Men's Association v. Commissioner, supra,* 392 U.S. 260; *Garrity v. New Jersey, supra,* 385 U.S. 492, in that petitioner here chose not to incriminate himself in response to respondent's questions; rather, petitioner chose to be subjected to insubordination charges. Since petitioner did not incriminate himself, even upon threat of sanction, the "automatic immunity" that was necessary to protect the employee in *Garrity* and *Spevack* did not arise. This Court in *Garrity v. New Jersey, supra,* 385 U.S. at 500, specifically stated that automatic immunity arises only to "prohibit use in subsequent criminal proceedings of statements obtained under threat of removal from office." In *Garrity*, the automatic use immunity was employed as a "shield" to prevent the employee's testimony from being unconstitutionally used against him. To suggest that such automatic use immunity existed at the time petitioner invoked the Fifth Amendment, however, even without his having been advised of its existence, would permit respondent to utilize

such automatic immunity as a "sword" to deprive petitioner of his employment for refusing to surrender his right against self-incrimination. Such a result is not suggested by the precedents of this Court and is inconsistent with the reasons for the development of the concept of automatic "use immunity."

The discharge of a public employee resulting from an unconstitutionally coercive choice is prohibited as an employee should not have to choose between surrendering his job or waiving his right against self-incrimination without knowledge of the existence of immunity. *Gardner v. Broderick, supra,* 392 U.S. 273. Being forced to make the choice is improper because, in the absence of knowledge that one will receive immunity if he testifies, such a choice is inherently coercive. This Court has made clear that the law will protect the employee from the adverse impact of the choice made. Therefore, in those cases where the employee chooses to testify, the Court imposes automatic use immunity upon that testimony for purposes of subsequent criminal prosecution. Where, on the other hand, the employee chooses not to testify, this Court has consistently held that the State will be prohibited from exacting a disciplinary penalty against the employee for making such a choice. *Uniformed Sanitation Men's Association v. Commissioner of Sanitation, supra,* 392 U.S. 280; *Gardner v. Broderick, supra,* 392 U.S. 273. The Court of Appeals' decision is, without question, contrary to the decisions of this court; petitioner was removed from his position of 34 years solely for making the choice not to incriminate himself.

The Court of Appeals' reliance on *Uniformed Sanitation Men's Association v. Commissioner of Sanitation,* 426 F.2d 619 (2d Cir. 1970), *cert. denied* 406 U.S. 961 (1970), is misplaced. This was the second case involving

the appearances of various sanitation workers before the New York City Commissioner of Investigation. In the first case, this Court reinstated fifteen such employees who had either refused to testify after being advised that their answers could be used against them, or who had refused to sign grand jury waivers of immunity. In the second case, the same plaintiffs were again called to appear for an inquiry. This time, however, the employees were explicitly told:

> ". . . the answers you may give to the questions propounded to you at this proceeding, or any information or evidence which is gained by reason of your answers, may not be used against you in a criminal proceeding except that you may be subject to criminal prosecution for any false answers that you may give . . ."

Uniformed Sanitation Men's Association v. Commissioner of Sanitation, supra, 426 F.2d at 621.

Having thus been affirmatively advised and assured that the answers they gave would not incriminate them, the employees could then be discharged when they failed to answer questions narrowly and specifically related to their job duties even under threat of disciplinary action. This fact that the employees were directly and clearly notified of their immunity crucially distinguishes the instant case from the second *Sanitation Men's* case. Such affirmative assurances of immunity are critical. *Weston v. U.S. Dept. of Housing and Urban Development,* 724 F.2d 943, 473, 946 (F.2d Cir. 1983); *Kalkines v. United States, supra,* 473 F.2d at 1395.

The mere threat of loss of employment does not, in and of itself, give rise to "automatic immunity," the existence

and scope of which the employee is presumed to know. It is the assurances to the employee, made by the employer, that the statements requested cannot be used criminally against the employee which enables the employee to make an informed, non-coercive choice. The Court of Appeals' determination fails to provide this crucial protection to petitioner.

The fact that use immunity would attach to petitioner's compelled answers is something that petitioner is not presumed to know. The precedents of this Court place the burden upon the employer to assure the employee that his answers would not be used against him criminally. Because petitioner was not advised that his answers could not be used against him, the choice he faced was coercive. As far as petitioner knew, he was being forced to either incriminate himself or lose his job. Giving testimony without the benefit of use immunity is equivalent to waiving immunity. In effect, therefore, petitioner was asked to waive immunity and his refusal to do so cannot be the subject of a disciplinary action. *Gardner v. Broderick, supra,* 392 U.S. 273.

Petitioner found himself in very difficult circumstances on August 14, 1984. On that date, he was called to give testimony at an investigatory proceeding under Section 61 of the N.Y. Public Officers Law. As of that date, he had also been served with disciplinary charges by respondent. Among the charges were allegations that petitioner had violated numerous provisions of the Penal Law.[3] Petitioner

[3]The charges stated that petitioner had violated the criminal statutes set forth below:

§115.00(1)—Criminal Facilitation
§165.15(8)—Theft of Services
§175.30 —Offering a False Instrument for Filing
§195.00 —Official Misconduct

was also aware that respondent had referred information concerning him to the Oneida County District Attorney and that an investigation was then ongoing. Petitioner thus had a legitimate reason to believe that the incriminating evidence requested of him would be used against him in a criminal proceeding. *See Kalkines v. United States, supra,* 473 F.2d at 1392. Yet, at the same time, petitioner's employer of thirty-four years was, in effect, threatening petitioner with loss of his employment if he did not provide such evidence, although no mention of immunity in return for providing it was made. The choice thus faced by petitioner was inherently coercive. It is unfair and inconsistent with precedents of this Court to condone petitioner's loss of his livelihood simply because he exercised his right against self-incrimination.

In the critical situation presented, the employer demanded that an employee waive his right against self-incrimination or face discharge. In such a situation, the burden is and must be on the employer to clearly advise the employee that immunity will attach to his answers. The burden placed upon the employee by the Court of Appeals decision to "guess" or speculate as to whether he will receive immunity is undue, unfair and unconstitutional. The constitutional privilege against self-incrimination is too fundamental to our system of justice to allow the employer to use such privilege as a sword against an employee, who without knowledge or notice of immunity, faces incrimination or discharge.

It is clear from the above-stated discussion that the New York Court of Appeals decided important, as well as controversial, questions of law in this proceeding. The Court of Appeals, however, misconstrued decisions of this Court and misapplied the principles derived from those decisions. For these reasons, the Court of Appeals decision must be reviewed and reversed.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
March 18, 1988

Respectfully submitted,

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APPENDIX A—New York State Court of Appeals Remittitur and Opinion.

Remittitur.

COURT OF APPEALS,

STATE OF NEW YORK.

THE HON. SOL WACHTLER, CHIEF JUDGE, PRESIDING

3 NO. 331

IN THE MATTER

OF

JOHN A. MATT, SR.,

Respondent,

v.

JAMES L. LAROCCA, as Commissioner of the New York State Department of Transportation,

Appellant.

The appellant in the above entitled appeal appeared by Hon. Robert Abrams, Attorney General of the State of New York; the respondent appeared by Hinman, Straub, Pigors and Manning, P.C.

The Court, after due deliberation, orders and adjudges that the judgment appealed from and order of the Appellate Division brought up for review is reversed, with costs, and determination of the Commissioner reinstated. Opinion by Judge Alexander. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County there to be proceeded upon according to law.

I certify that the proceeding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 21, 1987

Opinion.

COURT OF APPEALS,

STATE OF NEW YORK.

3 No. 331

IN THE MATTER

OF

JOHN A. MATT, SR.,

Respondent,

v.

JAMES L. LAROCCA, as Commissioner of the New York State Department of Transportation,

Appellant.

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Robert Abrams, Attorney General (John Q. Driscoll, O. Peter Sherwood & Peter H. Schiff of counsel) for appellant.

William F. Sheehan, Albany, for respondent.

ALEXANDER, J.:

Petitioner, a supervisory employee with the Waterways Division of the Department of Transportation where he had been employed for 34 years, was dismissed in November 1984 for refusing to answer questions directly relating to the performance of his official duties. In early 1984, the Department commenced an initial investigation apparently in response to reports of misconduct involving the unauthorized absence of employees in petitioner's section and the use of State property and facilities for the personal benefit of employees under petitioner's supervision. In the early stages of this investigation, petitioner cooperated by submitting to an interview by his superiors and answering numerous questions. Following this interview, petitioner was served with disciplinary charges pursuant Civil Service Law § 75, alleging several breaches of his supervisory responsibilities as well as violations of various sections of the Penal Law. At that time, petitioner was suspended for thirty days.

As a result of the Department turning over information related to these charges, petitioner also became the target of a criminal investigation conducted by the Oneida County District Attorney's Office. It does not appear, however, that petitioner was ever questioned by the District Attorney's office in connection with the criminal investigation.

Before a hearing was held on petitioner's disciplinary charges, the Commissioner of Transportation instituted an investigation of the misconduct in petitioner's division pursuant to section 61 of the Public Officers Law and requested that petitioner appear to testify under oath as to matters under his jurisdiction. Petitioner refused. The Commissioner thereafter served him with a subpoena *duces tecum* requiring him to appear and be examined under oath and to produce a diary maintained by him during

the time periods relevant to the misconduct (Public Officers Law § 61). When petitioner again refused, apparently on advice of counsel, a court order compelling his appearance was obtained. Although petitioner appeared with counsel in compliance with that court order, he did not produce his work-related diary. Moreover, he refused to answer questions pertaining to his duties as supervisor, and on the advice of counsel, repeatedly invoked his Fifth Amendment privilege against self-incrimination. Notwithstanding that he was told that a refusal to answer questions in the face of a direct departmental order would be considered insubordination,[1] petitioner persisted in refusing to answer questions that directly related to the performance of his duties as a supervisory employee. Petitioner was not informed by the Commissioner, or the Commissioner's counsel at the section 61 proceeding, that he was entitled by operation of law to immunity from the use of his answers in any subsequent criminal prosecution.

New charges of insubordination were preferred against petitioner as a result of his failure to respond to questions and his failure to produce his diary. At a hearing held on those additional charges only, petitioner contended that because the criminal investigation was still pending, and because he had not been offered immunity from prosecution should he answer the questions posed at the section 61 proceeding, he invoked—on his counsel's advice—his privilege against self-incrimination. The hearing officer concluded that, notwithstanding petitioner's claim that he had acted on counsel's advice, petitioner had wilfully refused to answer questions and to produce his diary and

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[1]Petitioner was advised on three separate occasions by Counsel for the Department that "[his] refusal to answer these questions will be considered further acts of insubordination"—that "the question is a direct order for an answer"—and "that it is the Department's position that your failure to answer that question in the face of the direct order constitutes insubordination."

that disciplinary action is permitted for the willful refusal to answer pertinent questions—even in the face of self-incrimination. He recommended a two-month suspension without pay. The Commissioner accepted the hearing officer's determination, but rejected the recommended sanction and instead ordered petitioner discharged, finding that he "had the benefit of constitutionally sufficient use immunity" and "must bear the responsibility for his action in thwarting the Department's orderly process of investigation and administration of the State's business".

Thereafter, petitioner instituted this article 78 proceeding challenging the Commissioner's determination. He asserted that his discharge violated his constitutionally guaranteed right against self-incrimination, that the finding of willful misconduct is not supported by the record, and that the penalty of dismissal after 34 years of faithful and competent service is so disproportionate as to be shocking to one's sense of fairness (*see, Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 233).

Addressing only the issue of whether petitioner was entitled to notice of the automatic receipt of immunity, a majority at the Appellate Division, in purported reliance on our decision in *People v Masiello* (28 NY2d 287), granted the petition.[2] The majority held that "an employee should be accurately and adequately apprised of the immunity conferred in return for answering potentially incriminating work-related questions as a matter of fundamental fairness" (*Matt v LaRocca*, 117 AD2d 151, 153). Two justices dissented, finding *Masiello* inapposite since here "the immunity * * * conferred attached automatically as a matter of law." (*Matt v LaRocca*, 117 AD2d at 154). We now reverse.

[2]In granting the petition the Appellate Division directed petitioner's reinstatement with back pay and all benefits lost. The parties having stipulated to a judgment awarding petitioner $50,789.75 in back pay and benefits, the Commissioner appeals to us as of right (CPLR 5601[d]) bringing up for review the order of the Appellate Division.

It would of course offend the guarantee against self-incrimination to require a public servant to answer questions—even those relating to the performance of his official duties—upon the threat of dismissal, and to make use of the incriminating statements in a subsequent criminal prosecution (*People v Avant*, 33 NY2d 265, 271; *see, Lefkowitz v Turley*, 414 U.S. 70, 78-79; *Gardner v Broderick*, 392 U.S. 273, 276-277; *Garrity v New Jersey*, 385 US 493, 500; *Uniformed Sanitation Men Assn. v Commissioner of Sanitation*, 426 F2d 619, 624 *cert. denied* 406 US 961). Indeed, we have held that answers "elicited upon the threat of loss of employment are compelled and inadmissible in evidence" (*People v Avant*, 33 NY2d at 271, *supra* [quoting *Lefkowitz v Turley*, 414 US 70, 85]; *see, Shales v Leach*, 119 AD2d 990). Thus, the Supreme Court has held that when a public employee is compelled to answer questions or face removal upon his refusal to do so, his responses are cloaked with immunity automatically, and neither the compelled statements nor their fruits may thereafter be used against him in a subsequent criminal prosecution (*see, Lefkowitz v Turley*, 414 US 70, 78-79; *Gardner v Broderick*, 392 US 273, 276-277; *Garrity v New Jersey*, 385 US 493, 500; *see also, People v Avant*, 33 NY2d 265, 271). The resulting immunity that attaches when a witness is ordered to answer such questions therefore, flows directly from the constitution, attaches by operation of law, and is not subject to the discretion of the employer.

It is settled, however, that the State "may compel any person enjoying a public trust to account for his activities and may terminate his services if he refuses to answer relevant questions, or furnishes information indicating that he is no longer entitled to public confidence" (*People v Avant*, 33 NY2d 265, 271, *supra; see also, Gardner v Broderick*, 392 US 273; *Uniformed Sanitation Men Assn. v Commissioner of Sanitation*, 426 F2d 619; *Shales v*

Leach, 119 AD2d 990, *supra*). Public employees, charged with a public trust, do not have an absolute right to refuse to account for their official actions and at the same time retain their employment. "To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, although assured of protection against use of his answers or their fruits in any criminal prosecution, would push the constitutional protection beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights" (*Uniformed Sanitation Men Assn. v Commissioner of Sanitation*, 426 F2d 619, 626, *supra*). As the Supreme Court observed in *Gardner v Broderick* (392 US 273), where a public servant (there a policeman) refuses "to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself * * * the privilege against self-incrimination would not [be] a bar to his dismissal" (*Gardner v Broderick*, 392 US 273, 278 [citation omitted]).

Thus, what is proscribed as unconstitutional is to condition public employment upon a waiver of the privilege against self-incrimination (*Gardner v Broderick*, 392 US 273, 278, *supra*). Hence, a public employer may not demand that its employee waive his right to immunity in exchange for continued employment, and may not dismiss that employee for his refusal to do so (*Gardner v Broderick*, 392 U.S. 273, 278 *supra*). Here petitioner does not contend that he was ordered to waive his right to immunity. Rather, he argues that at the time of the Public Officers Law § 61 proceeding, he was unaware that he would be entitled to immunity automatically upon answering the questions posed. Thus, although petitioner now concedes in his brief to us that immunity would have attached to his compelled answers by operation of law, he neverthe-

less argues that, as a matter of "fundamental fairness", he should have been explicitly advised of this immunity, and that the burden was upon the Commissioner to assure him that his answers would not be used against him in the criminal prosecution. Finally, petitioner maintains, because he was not so advised, his resulting dismissal was in violation of his privilege against self-incrimination, citing *People v Masiello* (28 NY2d 287).

Petitioner, however, misapplies our holding in *Masiello* (28 NY2d 287, *supra*). There, the issue was whether a purported grant of immunity to a witness who appeared before a Grand Jury but refused to testify, was a sufficient foundation upon which to base a criminal contempt conviction. The witness had refused to testify notwithstanding having been notified that the Grand Jury had voted, under § 619-c of the former Code of Criminal Procedure, to confer immunity. The notice given to the witness provided for only testimonial or "use" immunity, however, and not the full transactional immunity afforded by the statute. The witness therefore would have proceeded to testify under the misconception that the scope of the immunity he received was less than that to which he was actually entitled by statute. We held that the witness could not thereafter be prosecuted for refusing to testify under those circumstances because "fundamental fairness" required that a witness not be misadvised—indeed that a witness be accurately informed—concerning the scope of immunity conferred in a Grand Jury (*People v. Masiello,* 28 NY2d 287, 291, *supra*). Thus, *Masiello* held only that a witness appearing before a Grand Jury must be apprised of the extent of the immunity conferred by statute before a criminal contempt conviction may be had for the witness's refusal to testify (*see also, People v. Rappaport,* 47 NY2d 308, 313).

The circumstances here are very different from those in *Masiello*. Petitioner did not appear before a Grand Jury

investigating criminal charges; rather, his appearance was at a civil proceeding convened to investigate disciplinary charges of work-related misconduct. He was neither requested to waive his privilege against self-incrimination, nor was he faced with a possible criminal contempt conviction for refusing to testify; he stood only to be dismissed from his employment on charges of insubordination should he refuse to answer the questions posed by his employer. These questions specifically related to the performance of petitioner's official duties: wrongfully permitting an employee to be paid for time spent doing outside work for private individuals; approving time sheets he knew to be inaccurate; and allowing his subordinates to use State-owned materials and equipment for their personal benefit. Moreover, unlike in *Masiello* where the scope of the immunity conferred depended upon the discretionary action of the Grand Jury, here the immunity attached automatically by operation of law. Indeed, the immunity protecting petitioner flows directly from the constitution, and neither the Commissioner, nor counsel representing the Commissioner at the investigatory proceeding, had the power either to confer the immunity or to define or alter its breadth.

These critical distinctions persuade us that *Masiello* does not require the result urged by petitioner, and the State was not obligated to inform petitioner that immunity attached before ordering him to answer questions. As the Commissioner's representative at the investigatory proceeding did not have the power to confer immunity, or to modify the immunity to which petitioner was entitled, there is no basis for concluding that he nonetheless had an affirmative obligation to inform petitioner of the automatic attachment of immunity. It is true that the State is required to inform a witness appearing before a Grand Jury of the fact that he will receive automatic immunity, even though, under current law, such witnesses are con-

ferred transactional immunity automatically by operation of law (*see* CPL 190.40; *People v. Rappaport*, 47 NY2d 308, 313). The consequences, however, of refusing to testify before a Grand Jury—criminal prosecution for contempt—are more serious than those of refusing to answer questions in a Public Officers Law § 61 proceeding—dismissal from public employment. Furthermore, a witness testifying before a Grand Jury ordinarily does not have a right to have his attorney present, which is a crucial factor underlying the State's obligation to inform the witness of the immunity conferred in the Grand Jury context. On the other hand, in this civil proceeding petitioner was assisted and advised by counsel present throughout the hearing, a situation which does not implicate the danger faced by a witness testifying before a Grand Jury, who does not have immediate access to counsel, of unwittingly forfeiting his privilege against self-incrimination.

We conclude therefore that insofar as petitioner was not requested to waive his right to immunity before answering questions specifically, directly and narrowly relating to his official duties, his dismissal did not violate fundamental fairness or his privilege against self-incrimination. Moreover, there is substantial evidence in the record to support the Commissioner's determination that petitioner willfully refused to answer the questions posed, and dismissal under the circumstances is not "so disproportionate to the offense * * * as to be shocking to one's sense of fairness" (*Matter of Pell v. Bd. of Educ.*, 34 NY2d 222, 233).

Accordingly, the judgment appealed from and the order of the Appellate Division brought up for review should be reversed with costs and the determination of respondent Commissioner reinstated.

Judgment appealed from and order of the Appellate Division brought up for review reversed, with costs, and

determination of the Commissioner reinstated. Opinion by Judge Alexander. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur.

Decided December 21, 1987

APPENDIX B—Decision of the Appellate Division, Third Department.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

May 15, 1986 51307

IN THE MATTER
OF
JOHN A. MATT, SR.,

Petitioner,

v.

JAMES L. LAROCCA, as Commissioner of the New York State Department of Transportation,

Respondent.

Argued, February 4, 1986.

Before:

Hon. Robert G. Main,
Justice Presiding,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Hon. Howard A. Levine,
Hon. Norman L. Harvey,
Associate Justices.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Third Judicial Department by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of respondent which discharged petitioner from his employment with the Department of Transportation.

Hinman, Straub, Pigors & Manning (William F. Sheean of counsel), 90 State Street, Albany, New York 12207, for petitioner.

Robert Abrams, Attorney-General (John Q. Driscoll of counsel), The Capitol, Albany, New York 12224, for respondent.

MIKOLL, J.:

This matter arose from an investigation of alleged mismanagement and misconduct in section 4 of the Department of Transportation's Waterways Division, which was supervised by petitioner. At the initial stage of the investigation and before charges were formally brought, petitioner answered questions posed to him by his superiors regarding the inquiry. On February 28, 1984, petitioner was suspended for 30 days and concomitantly served with charges and specifications pursuant to Civil Service Law § 75, which, *inter alia*, contained an allegation that his breach of supervisory responsibility constituted a violation of the Penal Law. Petitioner also became the target of a criminal investigation conducted by the Oneida County District Attorney stemming from the same events. The investigation lasted from February 28, 1984 to October 17, 1984. Petitioner demanded a hearing in the disciplinary proceeding.

Instead of a hearing, petitioner was requested to submit to an examination under oath pursuant to Public Officers Law § 61. When petitioner refused to attend, a subpoena was then issued in April 1984 pursuant to Public Officers Law § 61 directing him to appear and testify under oath and to bring with him a work diary that he kept. Petitioner once again refused to appear. A court order pursuant to CPLR 2308 (b) was secured compelling petitioner's compliance with the subpoena. On August 14, 1984, petitioner appeared but, due to the pending criminal investigation, invoked his 5th Amendment right against self-incrimination and refused to answer questions or to submit his diary. During the interrogation, petitioner was advised that his refusal to answer would be considered insubordination. Petitioner was not informed at any time that if he answered, he was entitled to immunity by operation of law from any subsequent criminal prosecution based on any answers he gave. When petitioner failed to answer questions or produce his diary, additional charges of insubordination were preferred against him on October 2, 1984.

Petitioner again demanded a hearing on all disciplinary charges. Respondent advised petitioner that a hearing would be held only on the insubordination charges dated October 2, 1984. After a hearing, petitioner was found guilty of those charges and a 60-day suspension was recommended by the hearing officer. Respondent adopted the hearing officer's findings of insubordination but declined to adopt the recommended penalty, deciding instead to discharge petitioner from service. Respondent held that petitioner, had he chosen to answer the questions, would have been cloaked with immunity and that his refusal to cooperate despite such immunity constituted insubordination warranting dismissal.

Petitioner challenges the proceedings on the ground that since respondent failed to advise him that immunity

would attach to his responses by operation of law, his dismissal was in derogation of the constitutional protection against compelled self-incrimination (US Const, 5th amend; NY Const, art 1, § 6) and the proceedings against him were, therefore, void. We concur.

When a public employee is compelled to answer potentially incriminating questions relating to his work, he is automatically cloaked with transactional immunity under New York law. An employee should be accurately and adequately apprised of the immunity conferred in return for answering potentially incriminating work-related questions as a matter of fundamental fairness (*see, People v. Masiello*, 28 NY2d 287, 291; *see also*, CPL 50.20 [2] [b] [ii]). Respondent attempted to compel petitioner's answers under threat of charging him with insubordination. Petitioner was not advised that if he answered, transactional immunity would attach by operation of law to his testimony. Under such circumstances, petitioner was entitled to assert his constitutional privilege in the hearing conducted pursuant to Public Officers Law § 61 (*see, Kastigar v. United States*, 406 US 441, 444-445) without fear of dismissal (*see, Gardner v. Broderick*, 392 US 273).

Where immunity is conferred by the State, the State cannot penalize the assertion of the constitutional privilege against self-incrimination. We conclude that an individual can stand on his right against self-incrimination until it is made clear to him that he will receive immunity. The record discloses that petitioner was aware of the criminal investigation being conducted into the matters which were the subject of the examination conducted in August 1984. He was thus entitled to rely on his 5th Amendment prerogatives until such time as he was informed of the grant of immunity (*see, People v. Rappaport*, 47 NY2d 308, 313). Petitioner's early cooperation in the matter is to be noted. We find his subsequent refusal to answer questions under oath as not contumacious

but rather an understandable attempt to defend himself by the exercise of constitutionally protected rights.

YESAWICH, JR., J. (dissenting).

We respectfully dissent.

Had the State discharged petitioner for refusing to waive his privilege against self-incrimination, the appropriateness of an annulment would be clear (*see, Gardner v. Broderick*, 392 US 273). Such an attempt by the government to displace his 5th Amendment privilege would have activated an obligation on its part to advise the witness of the immunity conferred on his answers (*see, People v. Masiello*, 28 NY2d 287, 291).

But this case differs from *People v. Masiello* (*supra*) in two fundamental respects. First, unlike situations where a Grand Jury has discretion to determine whether immunity is to be granted, and the scope thereof, the immunity conferred here attached automatically by operation of law. Neither the State investigators nor counsel representing the Department of Transportation had any power to alter the breadth of that immunity, the sweep of which was as readily discoverable by petitioner or his attorney as by the State investigators. Furthermore, it is not without significance in this regard that petitioner's refusal to testify was not brought about by a sudden and unanticipated incident, but was the culmination of a long, adversarial process so that petitioner had ample opportunity to explore the implications of invoking his constitutional privilege.

The second and even more compelling reason why investigators were not obliged to define the extensity of petitioner's immunity is that this case does not even involve a displacement of petitioner's privilege against self-incrimination. Rather, the State, quite legitimately, terminated the services of one enjoying a public trust for refusing to account for his activities (*see, People v. Avant*, 33

NY2d 265, 271; *see also, Gardner v. Broderick, supra*). They asked questions, received no answers, and warned accurately that continued silence would subject petitioner to punishment for insubordination.

Petitioner may have been forced to choose between termination and self-incrimination; that, however, is wholly permissible (*see, Gardner v. Broderick, supra; People v. Avant, supra*). Resort to the threat of termination as a means of coercing petitioner to waive his privilege against self-incrimination would have been impermissible, but that course was not followed. Accordingly, we would confirm the administrative determination.

Opinion by Mikoll, J., in which Main, J.P., and Harvey, J., concur; Yesawich, Jr., and Levine, JJ., dissent and vote to confirm in an opinion by Yesawich, Jr., J.

Determination annulled, with costs, petition granted, and respondent is directed to reinstate petitioner to his former position with back pay and all other benefits lost.

APPENDIX C—Section 75, Civil Service Law, and Section 61, Public Officers Law.

§75. Removal and other disciplinary action

1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of public service, who is an honorable discharged member of the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer fireman as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

(c) an employee in the state service holding a position in the non-competitive class other than a position designated in the rules of the state civil service commission as

confidential or requiring the performance of functions influencing policy, who since his last entry into state service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

(d) an employee in the service of the City of New York holding a position as Homemaker or Home Aide in the non-competitive class, who since his last entry into city service has completed at least three years of continuous service in such position in the non-competitive class.

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than three years after the occurrence of the alleged incompetency or misconduct complained of and described in the charges provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if

proved in a court of appropriate jurisdiction, constitute a crime.

§61. Investigations by state officers

Every state officer, in any proceeding held before him, or in any investigation held by him for the purpose of making inquiry as to the official conduct of any subordinate officer or employee, shall have the power to issue subpoenas for and require the attendance of witnesses and the production of all books and papers relating to any matter under inquiry. All such subpoenas shall be issued under the hand and seal of the state officer holding such proceeding. A subpoena issued under this section shall be regulated by the civil practice law and rules. The testimony of witnesses in any such proceeding shall be under oath and the state officer instituting the proceeding shall have power to administer oaths. In case of state boards or commissions, any member of the same, or, when duly authorized by resolution, the secretary of such board or commission, shall have power to issue subpoenas and administer oaths for the purposes of this section.